Chia Foon Tau & Anor v Lim Pey Lin

HIGH COURT (MELAKA) — CIVIL APPEAL NO 11-5 OF 1997
SURIYADI J
25 AUGUST 1997

Contract *— Parties — Whether person can contract with himself — Whether tenancy agreement between partner and his partnership firm is valid and enforceable*

Land Law *— Tenancy — Contract of — Tenancy agreement for premises of partnership — Whether rents and assessments paid by partnership for partners land ought to be construed as rental — Whether Control of Rent Act 1966 apply*

One TC Chong ('TC') carried on a trade as a sole proprietor in the 1950s under the name of TC Chong & Co. On 1 January 1993, the business was converted into a partnership with the inclusion of the respondent as a partner. The agreement between the parties was contained in a memorandum of partnership dated 30 December 1992. Under cl 8 of the memorandum, it was agreed that so long as TC was the senior partner, no rental shall be payable in relation to the premises for the partnership ('the premises'). The premises was owned by TC himself. TC died on 2 March 1995 and the partnership was accordingly dissolved. The estate of TC ('the applicants') thereafter demanded vacant possession of the premises on or before 31 August 1995 vide a letter dated 9 June 1995. The respondent refused to do so. The applicants then proceeded to file a summons in the subordinate court and sought summary judgment. The claim for summary judgment was dismissed by the lower court; subsequently, the applicants appealed by way of the present action. The parties confined their arguments to three issues, namely, whether: (i) rents and assessments paid by the partnership ought to be construed as rental; (ii) the Control of Rent Act 1966 (the Act) had any application to the case; and (iii) a person could contract with himself.

Held, allowing the appeal:

Under common law, rent meant compensation for possession of the land and served as an acknowledgment of the tenant to the landlord of the tenure and in pursuant of a profit. Assessment rates and quit rents cannot be construed as compensation or profits from the land and therefore cannot be construed as rent (see p 766H); *Rousou v Photi* [1940] 2 KB 379 and *Sandanam v Lim Cheng* [1960] MLJ 241 followed. Without rent being payable, no contract could therefore have existed between TC and the partnership, or any member within it, and by that reasoning the Act would not be applicable in this case.

No consideration flowed from TC, a member of the partnership, to TC, the individual, in relation to cl 8 of the memorandum. As no consideration emanated from the respondent either, there could not be a contract between the respondent and TC as the owner of the

premises. On the facts of the case, TC had contracted with himself when the premises was allowed to be used by him without rental as long as TC was the senior partner. A covenant between one person and himself or one person with himself and others jointly must be void and cannot be enforced (see p 768C–D); *Boyce v Edbroke* [1903] 1 Ch 83, *Meyer & Co v Faber (No 2)* [1923] 2 Ch 421 and *Napier v Williams* [1911] Ch 361 and *Rye v Rye* [1962] AC 496 followed. In the circumstances, a good tenancy did not exist between TC, the individual and TC as a member of the partnership or TC the individual and the partnership (see p 769E–H).

[**Bahasa Malaysia summary**

TC Chong ('TC') menjalankan perniagaan sebagai tuan punya tunggal dalam tahun 1950 di bawah nama TC Chong & Co. Pada 1 Januari 1993, perniagaan tersebut telah ditukar kepada suatu perkongsian dengan memasukkan responden sebagai rakan kongsi. Perjanjian antara pihak-pihak yang terlibat terkandung dalam memorandum perkongsian bertarikh 30 Disember 1992. Di bawah perenggan 8 memorandum tersebut, telah dipersetujui bahawa selagi TC menjadi rakan kongsi kanan, tiada sewa akan dibayar berkaitan dengan premis untuk perkongsian ('premis tersebut'). Premis tersebut dimiliki sendiri oleh TC. TC meninggal dunia pada 2 Mac 1995 dan perkongsian tersebut dibubarkan. Pemegang harta TC ('pemohon') telah menuntut milikan kosong ke atas premis tersebut pada atau sebelum 31 Ogos 1995 berdasarkan suatu surat bertarikh 9 Jun 1995. Responden telah enggan berbuat demikian. Pemohon selanjutnya memfailkan suatu saman di mahkamah rendah dan memohon penghakiman terus. Permohonan untuk penghakiman terus tesebut telah ditolak oleh mahkamah rendah; seterusnya, pemohon merayu melalui tindakan ini. Pihak-pihak yang terlibat telah membataskan hujah kepada tiga isu, iaitu, sama ada; (i) sewa dan taksiran yang dibayar oleh perkongsian tersebut sepatutnya ditafsirkan sebagai sewa; (ii) Akta Kawalan Sewa 1966 boleh digunapakai terhadap kes ini; dan (iii) seseorang individu boleh berkontrak dengan dirinya sendiri.

Diputuskan, membenarkan rayuan:

Di bawah undang-undang Ingeris, sewa bermakna pampasan untuk pemilikan tanah dan bertindak sebagai pengakuan kepada tuan tanah ke atas sewaan dan menurut suatu untung. Kadar taksiran dan cukai pintu tidak boleh ditafsirkan sebagai pampasan atau keuntungan dari tanah dan dengan itu tidak boleh ditafsirkan sebagai sewa (lihat ms 766H); *Rousou v Photi* [1940] 2 KB 379 dan *Sandanam v Lim Cheng* [1960] MLJ 241 diikut. Tanpa sewa perlu dibayar, tiada kontrak boleh wujud di antara TC dan rakan kongsi, atau mana-mana ahli sekalipun, dan dengan alasan ini, Akta tersebut tidak terpakai dalam kes ini.

Tiada balasan timbul dari TC, sebagai seorang ahli perkongsian, kepada TC, seorang individu, berkaitan dengan perenggan 8 memorandum tersebut. Oleh kerana tiada balasan juga dari responden, maka tidak wujud juga kontrak di antara responden dan TC sebagai tuan punya premis tersebut. Berdasarkan fakta kes, TC telah membuat kontrak dengan dirinya sendiri apabila premis tesebut dibenarkan untuk digunakan olehnya tanpa sewa selagi TC menjadi rakan kongsi kanan. Perjanjian antara seseorang dan dirinya sendiri atau seseorang dengan dirinya sendiri dan lain-lain secara bersama semestinya terbatal dan tidak boleh dikuatkuasakan (lihat ms 768C–D); *Boyce v Edbroke* [1903] 1 Ch 83, *Meyer & Co v Faber (No 2)* [1923] 2 Ch 421, *Napier v Williams* [1911] Ch 361 dan *Rye v Rye* [1962] AC 496 diikut. Dalam keadaan tersebut, penyewa yang sempurna tidak wujud di antara TC, seorang individu dan TC sebagai ahli perkongsian atau TC sebagai seorang individu dan perkongsian tersebut (lihat ms 769E–H).]

Notes

For a case on parties, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2667.

For cases on tenancy, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2877–2884.

Cases referred to

Bagel v Miller [1903] 2 KB 212 (refd)
Boyce v Edbrooke [1903] 1 Ch 83 (follld)
Chia Foon Tau & Anor (suing as the executor of the estate of Chong Tzu Chieh, deceased) v Lim Pey Lin [1997] 5 MLJ 68 (refd)
Ellis v Kerr [1910] 1 Ch 529 (refd)
Friend v Young [1897] 2 Ch 421 (refd)
Meyer & Co v Faber (No 2) [1923] 2 Ch 421 (follld)
Napier v Williams [1911] 1 Ch 361 (follld)
Rousou v Photi [1940] 2 KB 379 (follld)
Rye v Rye [1962] AC 496 (follld)
Sadler v Whiteman & Anor [1910] 1 KB 868 (refd)
Sandanam v Lim Cheng [1960] MLJ 241 (follld)
Smith v Anderson (1880) 15 Ch D 247 (refd)
Tan Eng Choong v Foo Kai Yuen & Anor [1988] 1 MLJ 531 (refd)
Vasu Devan & Ors v VA Nair [1985] 1 MLJ 137 (refd)

Legislation referred to

Contracts Act 1950 s 26
Control of Rent Act 1966
Partnership Act 1961 ss 11, 21–33
Rules of the High Court 1980 O 77 r 1
Subordinate Courts Rules 1980 O 26A

A *Tee Geok Hock* (*GH Tee & Co*) for the applicant.
KP Ng (*KP Ng & Amardas*) for the respondent.

Suriyadi J: Sometime in the 1950s, a sole proprietorship was set up by one TC Chong who carried on a trade under the name of TC Chong & Co. This sole proprietorship on 1 January 1993 absorbed Lim Pey Lin, the
B respondent, as a partner thus turning that business into a partnership. To ensure that the contractual relationship was well delineated, the mutual rights and duties of both parties were set out in a memorandum of partnership on 30 December 1992. In the event this agreement was not formulated, they would have had to resort completely to ss 21–33 of the Partnership Act 1961 for assistance in the event of any dispute (see *Tan Eng*
C *Choong v Foo Kai Yuen & Anor* [1988] 1 MLJ 531). Pursuant to the memorandum as provided for by cl 8, the place of business was at Nos 6, 8 and 10, Lorong Gereja, Melaka ('the premises'). For easy reference, I reproduce cl 8 which reads:

> The business premises of the partnership shall be situated at Nos 6A, 6, 8 and
D 10, Lorong Gereja, 75000 Melaka and as long as Mr Chong Tzu Chieh is the senior partner, no rental shall be payable to Mr Chong Tzu Chieh, the owner, by the partnership.

By virtue of this provision, the partnership paid no rent so long as TC Chong was the senior partner of that partnership. The said premises were
E owned by TC Chong himself, the very same senior partner in that partnership. This partnership unfortunately did not last long as he died on 2 March 1995 and with his untimely death the altercation between the estate of TC Chong and the respondent began. It is trite law that when TC Chong died, the partnership also dissolved automatically (*Friend v Young* [1897] 2 Ch 421 and *Bagel v Miller* [1903] 2 KB 212).

F Partnership is the relation which subsists between persons, carrying on business with a view towards profit, jointly liable with the other partners for all debts and obligations of the firm incurred while he was a partner (*Tan Eng Choong v Foo Kai Yuen* [1988] 1 MLJ 531; *Chia Foon Tau & Anor (suing as the executor of the estate of Chong Tzu Chieh, deceased) v Lim Pey Lin*
G [1997] 5 MLJ 68). An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue in combination for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons who originally entered into the contract with one another (*Smith v Anderson* (1880) 15 Ch D 247 at p 273). The individuals may not be permanent,
H resulting in constant shifting of the parties culminating in the determination of the old and a creation of a new one. In Malaysia, it is trite law that every partner is an agent of the firm and of the other partners for purposes of the business. Subject to certain limitations, the firm is bound by the act of the partner. In fact after a partners death his estate is also severally liable for any debts or obligations so far as they remain unsatisfied (see O 77 r 1 of the
I Rules of the High Court 1980 and s 11 of the Partnership Act 1961). If a person did not act in his capacity as an agent but as a principal on his own, his act cannot be imputed to the firm and he alone is liable to them even

though the firm may have benefitted by them (*Vasu Devan & Ors v VA Nair* [1985] 1 MLJ 137). As it is in the current case if this was an indulgence to the senior partner by the landowner-cum-senior partner and the partnership benefits by it, it is so by coincidence.

Under English law, which is not dissimilar from that of Malaysia, a partnership or firm is not a person or legal entity although the firm may sue and be sued in the firms name. Farwell LJ in *Sadler v Whiteman & Anor* [1910] 1 KB 868 at p 889 had this to say:

> The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; *the firm name is a mere expression, not a legal entity,* although for convenience under O XLVIIIA it may be used for the sake of suing and being sued. (Hamilton J at p 487 endorsed this view in *The King v Holden* [1912] 1 KB 483; 35 *Halsbury's Laws of England* (4th Ed) p 3). (Emphasis added.)

Returning to the facts, in particular the dissolution of the partnership as a consequence of his death, the estate of TC Chong demanded vacant possession of the premises before 31 August 1995 vide a letter dated 9 June 1995. Unfortunately Lim Pey Lin, the co-partner-cum-respondent, refused to budge or hand over vacant possession of those properties. Unhappy with the scenario, the estate began litigation vide Civil Suit No 72–714–1996 and prayed for an order of vacant possession of the premises.

Thinking this was a clear cut case, the estate of TC Chong — now the plaintiff/appellant — took up a summary judgment application under O 26A of the Subordinate Courts Rules 1980. Unfortunately, the learned magistrate thought otherwise and refused to grant the order, resulting in the plaintiff filing a notice of appeal. The case finally came up before me whereupon both parties merely went on three relevant points, viz whether a person could contract with himself, whether the Control of Rent Act 1966 applies and whether payments of assessment rates and quit rents could be construed as rents. To avoid any unnecessary problems I will deal with the first issue last.

Jowitt's Dictionary of English Law (2nd Ed) p 1544 defines rent, inter alia, as:

> Rent may be regarded as of a twofold nature — first, as something issuing out of the land, as a compensation for the possession during the term; and secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure.

In *Rousou v Photi* [1940] 2 KB 379 — where s 2(1) of the Housing Act 1936 was discussed — it was held that that the word "rent" in the above subsection means the actual rent contracted to be paid by the tenant to the landlord for the use without any deduction therefrom of any sum in respect of rates or other outgoings which the landlord may have agreed to pay (see also *Words and Phrases Legally Defined* (Vol 4) p 299). In the case of *Sandanam v Lim Cheng* [1960] MLJ 241, the plaintiff claimed vacant possession of the premises and also RM980 arrears of rent plus RM574.60

A arrears of rates and mesne profits totalling RM103.80 per month. Apart from that the tenant/defendant had to pay certain charges by the Town Board. This case revolved around the issue of jurisdiction of the sessions court to hear a case where the money claimed had exceeded a certain amount. With the combination of the arrears of rent, rates and mesne profits, the sum had exceeded the jurisdiction of the sessions court to hear B the case. The relevant point which is applicable for the present case is the view point of Hepworth J who opined that rent meant rent from the common law point of view, of something issuing out of the rent, ie as a compensation for the possession of the said land and as an acknowledgement of the tenant to the landlord of the tenure. In other C words, it was pursuant to a profit. His Lordship further rationalized that any sum equal to the rates due to the landlord ought to be by way of claim for damages for breach of a condition of the agreement between the parties, again implying that rates do not fall within the ambit of rent. As in this case, similarly I see no reason to depart from the common law point of view and declare that assessment rates and quit rents cannot be construed as D compensation or profits from the land and therefore must reject the contention that they are rents. Without rents being payable, no contract therefore could have existed between TC Chong and the partnership, or any member within it, and by that reasoning too the Control of Rent Act 1966 would be inapplicable in this case.

E *Can a person contract with himself?*

Every promise and every set of promises forming the consideration for each other is an agreement and if enforceable by law is a contract. Following from that, all agreements are contracts if they are made by free will for a lawful consideration, with a lawful object and not declared to be void. F

Under s 26 of the Contracts Act 1950, an agreement made without consideration is void unless at the least made on account of natural love and affection between parties standing in a near relation to each other. Certainly TC Chong will be hard pressed to qualify under this provision as it requires two different parties and not the same person. Even if it is between the G partnership and an individual, certainly that indulgence is not based on natural love and affection, but more on business efficacy. Furthermore, the partnership is not related to TC Chong the individual nor was s 26(a) promulgated for situations with this predicament in mind.

Before embarking on the case law, perhaps it will not be inappropriate H if I were to expand and discuss some of the above intricacies and the material cl 8 at the outset in equation form. Let us assume that there are two parties, namely A + B who are from a partnership and C, an outsider. It is trite that if A and B agree on some issue, and C is not a party to that agreement, legally the latter cannot be held liable nor can he be dragged into any dispute which arose within the boundaries of that agreement. On that I understanding we have to see here TC Chong, the owner of the premises, as C, with TC Chong and the respondent (A and B) within the ambit of the agreement. Applying that simple equation to the current case, bearing in

mind that a partnership is a combination of two separate persons quite dissimilar to an entity as envisaged in the Companies Act 1965, we will be confronted with this equation: TC Chong contracts with [only (TC Chong) + (not with) (Lim Pey Lin)] equivalent to: A – (contracts with) [only (A) + (not with) (B)].

Following the above equation, read together with the contents of cl 8, it is undeniable that no consideration flowed from TC Chong, a member of the partnership to TC Chong the individual. As no consideration had also emanated from B (in this case the respondent) there cannot be said to be a contract between B and A the individual who is outside the perimeters of that partnership of [(A+B)]. The only residue that is left is the contract between the two As, within and without the brackets and who is the same person. A simple reading of this situation not only is confusing but will lead to ridiculous results as in reality what we are seeing is a contract made by A with himself. On that understanding, applying the present facts, it really means that TC Chong had contracted with himself when those premises were permitted to be used by him without rents so long as he was the senior partner. Surely this is absurd as it is improbable for a person to contract with himself let alone allow himself to be sued by himself in the event a breach of contract occurred along the way. A man cannot be a plaintiff and defendant simultaneously. On this issue, permit me to reproduce what Farwell J in *Boyce v Edbrooke* [1903] 1 Ch 83 which reads:

> As was said by Best CJ in Neale v Turton: There is no principle by which a man can be at the same time plaintiff and defendant. But perhaps the most instructive case on the point is Mainwaring v Newman, where Lord Eldon points out the distinction between a plea in abatement arising from non-joinder of a party, and the absence of any contract at all, owing to the same person being plaintiff and defendant. ... It is plain, therefore, that there is no contract at all which can be sued upon at law when one of the contracting parties covenants with himself and others jointly. It is obvious, of course, there can be none between a man and himself alone.

Surely too if consideration was supposed to flow from A the individual, to A a member of the partnership, that prerequisite will never be fulfilled as it is improbable that actual payments to himself will ever happen! In *Meyer & Co v Faber (No 2)* [1923] 2 Ch 421 the court in more succinct terms said:

> A partner cannot be a creditor of or a debtor to his firm or sue his firm or be sued by it, in as much as the English law does not recognize the existence of a firm as distinct from the members of it.

In *Napier v Williams* [1911] 1 Ch 361, one CR was one of the trustees of an estate who later executed a lease between himself as a lessee and his co-trustees as lessors. The lease (of a house) was supposed to be for 21 years. Having entered into possession, he carried on business on the premises till he sold the business to a company and assigned the term to them. The company issued debentures secured by a trust deed which included the lease. Problems cropped up later resulting in an application by the lessors against the trustees of the debenture trust deed for a declaration that the lease was binding on the debenture trustees and that they held the premises

A subject to the lessees covenants. The court held that as the covenants were by one person with himself and others jointly, the covenants therefore were void but not the lease.

In *Rye v Rye* [1962] AC 496, Viscount Simonds on an issue of lease at p 505 said:

B

> The question, then, can conveniently be examined by asking whether the subsection enables A to grant a lease to himself of land of which he is the owner ... which creates the relationship of landlord and tenant between himself and himself. I find this a strange conception ... . Yet it is meaningless to say that a man accepts from himself something which is already his own ... what meaning is to be attributed to this where the lessee is also the lessor?

C

Lord MacDermott at p 507 in similar vein had this to say:

> I turn, therefore, to the question of law. At common law a person could not convey real or personal estate either to himself or to himself and another.

Lord Denning also aired his view and said at p 513:

D

> Is it possible for a person to grant a tenancy to himself? Or for two persons to grant a tenancy to themselves? At common law it was clearly impossible. *Nemo potest esse tenens et dominus. A person cannot be at the same time, both landlord and tenant of the same premises* ... . Neither could a person at common law covenant with himself, nor could two persons with themselves. *Neither could one person covenant with himself and others jointly.* (Emphasis added.)

E

(See also *Ellis v Kerr* [1910] 1 Ch 529 where the same person was both the covenantor and covenantee).

I see no reason to depart from the above view and feel secure in asserting that a covenant between one person and himself or one person with himself and others jointly must be void and cannot be enforced. F Applying this principle, without that relevant covenant in the memorandum, as in this case, the nexus between the premises and the respondent becomes non-existent. At the risk of repeating, apart from cl 8 there is no other provision relating to that tenancy in the memorandum. The tenancy must stand or fall on this clause. Therefore if that covenant, G the very foundation of the tenancy, cannot stand I fail to see how that supposed tenancy can stand. With the multi-negative facets staring at me, particularly the non-presence of consideration, the improbability of a person contracting with himself, a memorandum of partnership which was formulated merely to bind the partners, with many issues still uncertain or capable of being uncertain, no way could I have decided that a good tenancy H did exist between TC Chong the individual and TC Chong a member of the partnership or TC Chong the individual and the partnership.

On those premises, the appeal was allowed with cost.

Appeal allowed with costs.

I Reported by Lew Chee Seong